

California Fair Political Practices Commission

MEMORANDUM

To: Chairman Getman, Commissioners Downey, Knox and Swanson

From: Hyla P. Wagner, Senior Counsel
Luisa Menchaca, General Counsel

Date: May 20, 2002

Subject: **Adoption of Amendments to Regulation 18707.4**
Public Generally: Appointed Members of Boards and Commissions

Regulation 18707.4 sets forth a narrow exception from the conflict-of-interest rules for members of boards and commissions who are appointed to represent a particular economic interest. At its April 12, 2002 meeting, the Commission held a prenotice discussion of several minor changes to regulation 18707.4 to conform it to current advice, make the “significant segment” standard clearer, and add the concept of foreseeability. The impetus for changes to the regulation were issues raised by staff in the conflict of interest regulations improvement project and issues brought to the Commission’s attention by L.A. Care Health Plan in the fall of 2001.

The proposed amendments to regulation 18707.4 are attached as Appendix 1. This memorandum briefly summarizes the changes to the regulation that the Commission will be considering for adoption. (The prenotice memorandum, attached as Appendix 2, provides background on the regulation and discusses the amendments in more detail.)

1. Foreseeability. First, in subdivision (a)(3) of regulation 18707.4, we would add the concept of foreseeability by substituting “reasonably foreseeable material financial effect” for “material financial effect.” This addition conforms the appointed boards regulation to the standard conflict of interest analysis.

2. Significant Segment. Second, the addition to subdivision (a)(4) would quantify the “significant segment” standard within this regulation itself. Subdivision (a)(4) states that the exception only applies if the “decision of the board or commission will financially affect the member’s economic interest in a manner that is substantially the same or proportionately the same as the decision will financially affect a significant segment of the persons the member was appointed to represent.” In the past we determined the “significant segment” threshold by cross-referencing to the definitions of “significant segment” in regulations 18707.1 (public generally - general rule) or 18707.7 (public generally - predominant industry, trade or profession). The application of regulation 18707.4 will be clearer if the significant segment is defined in the regulation itself. The proposed threshold of fifty percent was considered by the Commission during the prenotice discussion and was chosen because the group of “persons the member was appointed to represent” may be a relatively small number of individuals or entities.

3. Board Member's Economic Interest. Third, we propose amending regulation 18707.4(b) so that the requirement in subdivision (a)(2) for the board member to have the economic interest he or she represents can be implicit. For the exception to apply, regulation 18707.4 subdivision (a)(2) currently states that the board member must be required by law to have the economic interest he or she represents. However, regulation 18707.4 has been appropriately applied where the statute authorizing creation of the board or commission does not explicitly require the member to have the economic interest the member represents, but given the statutory scheme, it is clear that the statute anticipates that the board member will likely have the economic interest the member represents. The proposed regulatory change will authorize this application of the exception.

Finally, we propose to correct a typographical error in subdivision (b). The reference in the second line of subdivision (b) should be to section 18707.4(a)(1), not (b)(1).

During the notice period, staff received one comment from Deputy Attorney General Ted Prim. He raised the issue of the application of the regulation to board members who represent a particular constituency such as "labor" or "seniors" rather than a traditional industry, trade or profession. He wondered whether the Commission should pursue a change to the regulation to clarify whether such board members are included in the exception. Regulation 18707.4 has been applied in advice letters in several cases to such board members, as in the *Rankin* and *O'Hara* Advice Letters, Nos. A-94-310 and A-94-315, summarized in the chart attached as Appendix 3.

A similar comment had been raised internally and staff considered whether to modify the language in subdivision (a)(1) to state that the law authorizing the board or commission provides that the persons appointed to the board or commission are appointed to represent and further the interests of "a specific group" rather than a "specific economic interest." However, we determined that such language was ambiguous and potentially broadened the scope of the exception too much, and we therefore favored keeping the "specific economic interest" language. In situations where a board member is appointed by law to represent a constituency such as "labor" or "seniors," and the board member has income from being the head of a labor union or being the executive director of a nonprofit assisting seniors, regulation 18707.4 may still apply. In fact, the proposed change to subdivision (a)(2) facilitates the application of the regulation in such situations.

Recommendation. Staff recommends that the Commission approve the amendments to regulation 18707.4 for adoption without change to the pre-notice version.